FILED
FEB 13 1956
HAROLD B. WILLEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1955.

No. ...696

WILBUR A. SALE,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

HARRY GERSHENSON,
Suite 1602—506 Olive Street,
St. Louis 1, Missouri,
WILBUR A. SALE,
Suite 1010—721 Olive Street,
St. Louis 1, Missouri,
(Pro se),
KAROL A. KORNGOLD,
Suite 1216—721 Olive Street,
St. Louis 1, Missouri,
Counsel for Petitioner.

February 15, 1956.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 1-4477.

INDEX.

	Page
Petition for Writ of Certiorari	1
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statutes Involved	2
Statement of Case	3
The Decisions of the Court Below	5
Reasons for Granting the Writ	6
Conclusion	10

APPENDIX.

Judgment of the U. S. Court of Appeals for the Eighth Circuit	21
Opinion of the U. S. Court of Appeals for the Eighth Circuit	11-20
26 U. S. C., Sections 3614 (a), 3615 (a), 3615 (e), 3633	21-33

CITATIONS.

Brownson v. U. S., 32 F. 2d 844	6, 7
Cudahy Packing Co., Ltd., v. Holland, 315 U. S. 357	6, 9
Falcone v. Barnes, 24 Law Week, No. 27, 4066	6, 9
In Re Wolrich et al., 84 Fed. Supp. 481	6, 8
Martin, Internal Revenue Agent, v. Chandis Securities Co., 128 F. 2d 731 (9th Cir.)	6, 7, 8
United States v. Minker, 24 Law Week, No. 27, 4066	6, 9

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1955.

No. .....

WILBUR A. SALE,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, Wilbur A. Sale, prays that a Writ of Certiorari be issued to the United States Court of Appeals for the Eighth Circuit, to review the judgment of that Court in Cause No. 15374, wherein that Court affirmed the judgment of the District Court for the Eastern District of Missouri, which latter judgment directed the petitioner to appear and honor a subpoena issued by a Special Agent of the Bureau of Internal Revenue.

OPINIONS BELOW.

The opinions below appear:

1. The opinion of the Court below is not officially reported. It is printed in the appendix hereto, page 11.

2. The opinion of the District Court, Judge George H. Moore, is set out in the record (page 20) filed herewith.

JURISDICTION.

The judgment of the Court below was entered January 13, 1956. No petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTIONS PRESENTED.

This case presents the following questions:

1. Does a special agent of the Bureau of Internal Revenue have the authority under the provisions of the 1939 Internal Revenue Code to issue a subpoena duces tecum requiring a party to appear, give evidence, and produce records?

2. Does the District Court have authority or jurisdiction under the provisions of the 1939 Internal Revenue Code to enforce a subpoena issued by a special agent of the Bureau of Internal Revenue, by attachment or arrest of the parties on whom same has been served prior to a judicial determination that said subpoena was lawfully issued and served?

STATUTES INVOLVED.

The principal statutory provisions involved are Title 26, U. S. C., Sections 3614, 3615 and 3633; said sections are set out in the appendix, pages 21, 22, and 23.

STATEMENT OF CASE.

The petitioner herein, Wilbur A. Sale, is a lawyer and has been actively engaged in the practice of law in the City of St. Louis for several years. He was formerly employed by the Bureau of Internal Revenue as an agent. In the practice of law he specializes in income tax matters. During the year 1953 one John F. Clark, a Special Agent of the Internal Revenue Service, was investigating the 1946-1949 tax liability of John Gazzoli and Albert Librach, who were clients of petitioner. During the years 1946 to 1949, one Rosenbaum was a part time bookkeeper and accountant for the above named taxpayers, Gazolli and Librach, and in performing such duties had made out certain work papers which said Rosenbaum retained until 1953 when, at the request of said taxpayers, such work papers were delivered to Sale, as attorney for the taxpayers who, since said date, has retained possession of said papers. On May 4, 1953, Clark, as Special Agent, executed and served upon Sale a summons to appear, to testify and to produce the work papers and schedules prepared by Rosenbaum covering the years 1946-1949, said action being taken pursuant to Section 3614 of the 1939 Internal Revenue Code.

Upon receipt of said summons Sale immediately notified Clark that the work papers requested were the property of his clients and were privileged communications in his hands as an attorney, and that he could not comply with the summons unless directed by the court so to do. A little more than a year later (May 19, 1954) the U. S. District Attorney, at the request of the Commissioner of Internal Revenue, filed a petition for attachment in the District Court, alleging the issuance of the aforesaid summons and the refusal of Sale to appear in obedience thereto. On the same date the court ordered that an attachment be issued

and that the U. S. Marshal bring Sale into court for appropriate action to compel obedience to said summons. Sale was thereupon taken into custody by the Marshal, brought before the court and released on his own recognizance, subject to further action of the court. Thereafter Sale filed his motion to dissolve and discharge the attachment, and to quash the subpoena duces tecum served upon him by the special agent. A return to the petition was also filed. Said motions were submitted to the court on June 16, 1954, at which time the respondent also introduced evidence pertaining to the case. The District Court entered the order appealed from on March 31, 1955, and appeal was taken therefrom, and the execution of the order stayed.

The petitioner contended before the District Court that the attachment should be dissolved and discharged and the subpoena duces tecum should be quashed for the following reasons:

a. Neither the Commissioner of Internal Revenue nor the special agent had any authority under the law to issue a summons or subpoena; that there is no provision in the 1939 Internal Revenue Code expressly granting to the Commissioner or a special agent a power to issue a subpoena or summons and that, absent such express authority, such power does not exist.

b. That even if the Commissioner of Internal Revenue or the special agent had authority to issue a summons or subpoena, same could not be enforced by a petition for attachment prior to a judicial determination that said subpoena was lawfully issued and served; that a petition for attachment is not an appropriate process within the meaning of Section 3633 of Title 28, U. S. C., and that, therefore, the court acquired no jurisdiction over petitioner and had no jurisdiction to order the petitioner to comply with the summons.

c. The work papers of the taxpayer prepared by the bookkeeper, Rosenbaum, were the properties of the taxpayer and the privilege of attorney and client exists as to such papers. (This question is not being raised in this court.)

THE DECISIONS OF THE COURT BELOW.

The District Court overruled the petitioner's motion to dissolve and discharge the attachment and to quash the subpoena duces tecum served upon him by the special agent; the court construed the petition for attachment as a prayer for appropriate process to compel the appearance and production of books, etc., under Section 3633 (a) of the Internal Revenue Code of 1939. The court, however, on its own motion, dissolved the writ of attachment and ordered the petitioner to obey the summons. (See Record, Opinion of District Court.) The U. S. Court of Appeals (Van Oosterhout, C. J.) sustained the District Court and held that while 28 U. S. C., Section 3614 (a), does not set out how the Commissioner is to enforce the attendance of a person, and while said Section does not specifically state that the Commissioner or his delegate is authorized to issue a subpoena or a summons, said right has long been recognized and that, therefore, the special agent had the authority to issue said summons.

The court below further held that attachment is an appropriate process to enforce the Commissioner's summons, and that since attachment is appropriate process, the District Court acquired jurisdiction over the petitioner and was authorized to enforce the summons. The court's view that attachment is an appropriate process is based on the logic that if an attachment is an authorized process for enforcing a collector's summons, there is no logical reason why it would not be an appropriate process for enforcing the Commissioner's summons.

In a separate concurring (specially) opinion, Judge Johnsen held that, except for the previous holding of the Eighth Circuit Court in the case of **Brownson v. U. S.**, 32 F. 2d 844, he would not be willing to regard Sections 3614 (a) and 3633 of the 1939 Internal Revenue Code as authorizing application for personal arrests to be made in the enforcement of revenue agent investigative subpoena or summons; that contempt or contumacy in the nature of contempt as the basis for an application for arrest does not and cannot exist in the administrative or executive branch of the government except by virtue of an express legislative act directly creative of it; that the right to an attachment against a person as for contempt is restricted by statute and that Sections 3614 (a) and 3633 are without language authorizing the granting of a right to an attachment against a person for contempt or the prescription of safeguards of a preliminary hearing on the application for such arrest, but, notwithstanding the absence of the provisions in the statute, the Brownson case is controlling on the Court.

REASONS FOR GRANTING THE WRIT.

The court should grant the writ because:

1. The decision of the court below is contrary to and in conflict with the implied decision of the Ninth Circuit in the case of **Martin, Internal Revenue Agent, v. Chandis Securities Co.**, 128 F. 2d 731, 9th Cir., and is also in conflict with the case of **In Re Wolrich et al.**, 84 Fed. Supp. 481, and is also in conflict with the decisions of the Supreme Court in the following cases: **Cudahy Packing Co., Ltd., v. Holland**, 315 U. S. 357, 363-364, and the case of **U. S. v. Minker**, and **Falcone v. Barnes** (decided January 16, 1956, 24 Law Week, No. 27, pages 4066 et seq.).

The decision of the court below is based on an arbitrary construction of the statute given it by the court. The

court concedes in its opinion that there is no provision in the statute authorizing the Commissioner or his delegate to issue a subpoena or a summons and further concedes that the statute does not set out how the Commissioner can enforce the attendance of any person whose examination is authorized. The court concludes, however, that said right has long been recognized and that "the process for documents will be implied whenever testimonial compulsion in general is predicated by statute." The court further concluded that the inquisitorial powers granted to the Commissioner under Section 3614 (a) is similar to the power vested in federal grand juries.

The court, therefore, assumes that such power is invested in the Commissioner or his deputy.

The court below further held that Section 3633 provides that the district shall have jurisdiction to compel attendance and production of papers by "appropriate process", and that "attachment" is appropriate process. This conclusion is premised on the argument that if attachment is an authorized method for enforcing a collector's summons (under Section 3615), it is likewise "appropriate process" for enforcing a Commissioner's summons.

The Court then concluded, premising its conclusions on the foregoing, that the District Court had jurisdiction of the person and subject matter.

The interpretation thus given to the sections of the statutes involved, namely, 3614, 3615 and 3633, constitutes, we believe, an erroneous and significant departure from the decisions of this court and other courts.

We believe the decision of the Eighth Circuit Court of Appeals in the **Brownson** case, supra, is in conflict with the Ninth Circuit case of **Martin, Internal Revenue Agent, v. Chandis Securities Co.**

In no case heretofore presented to the courts, and this includes the Brownson case, and other cases cited in the opinion of the Eighth Circuit Court of Appeals, have the questions which arise in this case been directly raised. We refer to the questions of (1) whether or not the Commissioner of Internal Revenue or his special agents have the right to issue a summons or subpoena, and (2) how such summons, if issued, shall be enforced.

A case in which this question was touched upon is the case of **Martin, Internal Revenue Agent, v. Chandis Securities Co.**, 128 F. 2d 731, l. c. 736, wherein the court said:

> "Another point not discussed by the parties arises because of the fact that the summons involved herein was not issued by the collector. No statute is cited authorizing issuance of a summons by one other than a collector. Whether the summons was invalid because not issued by the collector is a question upon which we express no opinion."

Thus the very act which petitioner questions in this case was likewise questioned by the Ninth Circuit Court of Appeals.

Again, the District Court of New York, in the case of **In Re Wolrich et al.**, 84 F. Supp. 481, had occasion to discuss the statutes involved. One of the questions in the case was whether the summons issued by the Internal Revenue Agent had to be served personally. In the course of the opinion the court said:

> "Since the so-called Commissioner's summons is not a summons, disobedience of which is an offense, or in any way punishable but merely a request of which Guerion had actual notice, the failure to 'serve personally' is meaningless."

(The Court also discussed generally the meaning of "appropriate process.")

In the late cases of **U. S. v. Minker,** and **Falcone v. Barnes,** decided January 16, 1956, by the Supreme Court, the court referred to the **Cudahy Packing** case, supra, wherein it is stated "true there can be no penalty incurred for contempt before there is a judicial order of enforcement." The attempt of the District Court and the court below to read into the several sections of the 1939 Revenue Code herein involved, powers by implication, and thus deprive a citizen of liberty without judicial process is contrary to the decisions above mentioned.

As above noted and as stated in the opinion of the court below there is nothing in the statute (3614) authorizing the commissioner or his delegate to issue a subpoena or a summons.

The statute simply provides that the Commissioner or his delegate may require the attendance of a person having knowledge in the premises, and may take his testimony, etc., but there is nothing in the law as to how the requirements for attendance may be enforced.

Section 3633 provides that the District Court shall have jurisdiction to compel attendance and production of papers by "appropriate process." But there is no provision stating what is "appropriate process." Certainly an "arrest" is not a process as that term is used in the statute.

By way of contrast, the statute (Sec. 3615) expressly provides that the Collector of Internal Revenue shall have the power to issue a summons and that the District Court shall have the power to enforce same by attachment. If Congress intended that the same procedure should be followed it could have so provided.

Thus we are presented with a situation wherein a citizen is dragged into court by the nape of his neck, and after he is before the court, the court then holds that the arrest is

not necessary, but that since he is before the court, the court will hold onto him and compel him to comply with the court orders.

Petitioner contends that not only was the Revenue Agent without authority to issue a subpoena, but that the court obtained no valid jurisdiction over petitioner by the attachment.

CONCLUSION.

For the reasons stated, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

HARRY GERSHENSON,
Suite 1602, 506 Olive Street,
St. Louis 1, Missouri,
WILBUR A. SALE,
Suite 1010, 721 Olive Street,
St. Louis 1, Missouri,
(Pro se),
KAROL A. KORNGOLD,
Suite 1216, 721 Olive Street,
St. Louis 1, Missouri,
Counsel for Petitioner.

February 15, 1956.

APPENDIX.

Opinion of U. S. Court of Appeals for the Eighth Circuit.

UNITED STATES COURT OF APPEALS
for the Eighth Circuit.

No. 15,374.

Wilbur A. Sale, Appellant,
vs.
United States of America, Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

[January 13, 1956.]

Karol A. Korngold for Appellant.

Charles H. Rehm, Assistant United States Attorney (Harry Richards, United States Attorney, was with him on the brief), for Appellee.

Before Sanborn, Johnsen and Van Oosterhout, Circuit Judges.

Van Oosterhout, Circuit Judge.

Appellant, Sale, appeals from an order of the District Court overruling his motions to dissolve and discharge

attachment and to quash subpoena duces tecum, said order further directing Sale to appear before John F. Clarke, Special Agent, Internal Revenue Service, and to produce and deliver certain work papers in Sale's possession, prepared by an accountant for John Gazzoli and Albert Librach, hereinafter referred to as taxpayers, who were clients of Sale, an attorney at law.

Jurisdiction of this court is invoked under 28 U. S. C., § 1291. It would seem that the order appealed from is a final order and that an appeal lies. **Brownson v. United States,** 8 Cir., 32 F. 2d 844, 846; **Falsone v. United States,** 5 Cir., 205 F. 2d 734, 737; **In re Albert Lindley Lee Memorial Hospital,** 2 Cir., 209 F. 2d 122, cert. den., **Cincotta v. United States,** 347 U. S. 960.

Special Agent Clarke was investigating the 1946-1949 tax liability of taxpayers for whom Sale acted as an attorney at all times material to this controversy. Rosenbaum had acted as part-time bookkeeper and accountant for the taxpayers, and in performing such duties had made out certain work papers which Rosenbaum retained with other papers in his office until 1953 when, at the request of taxpayers, such work papers were delivered to Sale who has since retained possession of such papers.

On May 4, 1953, Clarke, as Special Agent, executed and served upon Sale a summons to appear to testify and to produce the work papers and schedules prepared by Rosenbaum covering the years 1946-1949, said action being taken pursuant to section 3614 of the Internal Revenue Code of 1939.[1] Sale immediately upon receiving the summons advised Clarke by letter that the work papers requested were the property of his clients and were privileged communications in his hands as attorney, and that he could not comply with

[1] Statutory references in this opinion unless otherwise indicated are to the Internal Revenue Code of 1939 as amended.

the summons unless directed by the court to do so. Slightly more than a year later, on May 19, 1954, the United States District Attorney at the request of the Commissioner of Internal Revenue filed petition for attachment in the District Court, alleging the issuance of the aforesaid summons and the refusal of Sale to appear in obedience thereto. On the same date the court ordered that an attachment be issued, and that the marshal bring Sale into court for appropriate action to compel obedience to said summons. Pursuant thereto, Sale was taken into custody by the marshal and was brought before the court and released on his own recognizance subject to further action of the court. Thereafter, Sale filed his motion to dissolve and discharge the attachment and to quash the subpoena duces tecum served upon him by the Special Agent. This case was submitted to the court on June 16, 1954. The order appealed from was entered on March 31, 1955. Thereafter upon Sale filing a $250 bond the execution of the order appealed from was stayed until this appeal is passed upon by this court.

Sale contends that the order of the trial court should be reversed for the following reasons:

I. Neither the Commissioner of Internal Revenue nor the Special Agent has any authority under the law to issue a summons or subpoena.

II. A petition for attachment is not an appropriate process within the meaning of section 3633. The court acquired no jurisdiction to order the appellant to comply with the summons.

III. The work papers of the taxpayers prepared by the accountant are the property of the taxpayers, and the privilege of attorney and client exists as to such papers.

We proceed to the consideration of the errors urged in the order above indicated.

I. Section 3614 (a)[2] provides:

> "The Commissioner, for the purpose of ascertaining the correctness of any return or for the purpose of making a return where none has been made, is authorized, by any officer or employee of the Bureau of Internal Revenue, including the field service, designated by him for that purpose, to examine any books, papers, records, or memoranda bearing upon the matters required to be included in the return, and may require the attendance of the person rendering the return or of any officer or employee of such person, or the attendance of any other person having knowledge in the premises, and may take his testimony with reference to the matter required by law to be included in such return, with power to administer oaths to such person or persons."

It is true, as contended by appellant, that the above section does not set out specifically how the Commissioner is to enforce the attendance of a person whose examination is authorized, nor is it specifically stated that the Commissioner or his delegate is authorized to issue a subpoena or a summons.[3] The right of the Commissioner or his delegate

---

[2] Commissioner's Reorganization Order No. 6, dated May 15, 1952 (17 F. R. 4587), delegated to the Directors of Internal Revenue authority under sections 3614 and 3615 of the 1939 Code to examine books and witnesses. Commissioner's Reorganization Order No. 15, dated July 1, 1953 (1953—2 Cum. Bull. 505), granted authority to District Directors to redelegate these functions to any subordinate, except as otherwise directed.

[3] Under the 1939 Internal Revenue Code agents' summons were issued under 3614 and collectors' summons were issued under 3615. These sections have been combined in the 1954 Code, and section 7602, which specifically authorizes the Secretary or his delegate to issue summons. See also sections 7603-7606, inclusive, of the 1954 Internal Revenue Code. The Report of the House Ways and Means Committee on the 1954 Internal Revenue Code, H. R. 1337, March 9, 1954, 1954 U. S. Code Congressional Service, p. 4584, and the Report of the Senate Finance Committee, 1954 U. S. Code Congressional Service, p. 5268, each state that section 7602 of the In-

under the 1939 Internal Revenue Code to issue a summons has long been recognized. **Brownson v. United States**, supra; **Falsone v. United States**, supra; **United States v. United Distillers Products Corporation**, 2 Cir., 156 F. 2d 872; **Schulman v. Dunlap, Commissioner**, S. D. N. Y., 105 F. Supp. 104; **United States v. Peoples Deposit Bank & Trust Co.**, E. D. Ky., 112 F. Supp. 720, affirmed 6 Cir., 212 F. 2d 86. In the **Brownson** case the agent signed and served a summons upon a Western Union superintendent to produce records in connection with a receipt by the taxpayer of $500. The superintendent appeared but refused to produce the record. Thereupon, a writ of attachment was applied for and obtained. This court upheld the agent's summons and the attachment, concluding, "Our conclusion is that the steps taken by the Commissioner and by the court to secure the desired evidence were authorized and regular." The court in the course of its opinion states (p. 847):

> "This testimonial duty to attend and disclose applies equally to the production of documents; and the process for documents will be implied whenever testimonial compulsion in general is predicated by a statute. Wigmore on Evidence, § 2193, and note."

In the **Falsone** case, supra, the Internal Revenue Agent served a summons upon taxpayer's accountant who refused to appear. The District Court upon Government's petition ordered the accountant to obey the summons. A motion to vacate the order and quash the summons was overruled. The judgment was affirmed on appeal, the court saying in part (p. 742):

> "We have heretofore noted that the power granted to the Commissioner by 26 U. S. C. A., § 3614 is in-

---

ternal Revenue Code of 1954 contains no material change from existing law. It seems clear that Congress in enacting the 1954 Internal Revenue Code did not consider that in specifically authorizing the Secretary or his delegate to issue summons it would be granting such officers any new powers.

quisitorial in character and is similar to the power vested in federal grand juries. As said by the Eighth Circuit in **Brownson v. United States**, supra, at 32 F. 2d, at page 848, '* * * the statutes involved * * * should receive a like liberal construction in view of the like important ends sought by the government.' * * *"

The cases cited by the appellant do not support his contention that the Commissioner or his delegate lacks power to issue a summons. In **Martin v. Chandis Securities Company**, 9 Cir., 128 F. 2d 731, the court states that it is expressing no opinion upon whether the summons was invalid because not issued by a collector. **In re Wolrich**, S. D. N. Y., 84 F. Supp. 481, enforces the Commissioner's summons and does not support the appellant's contention.

The Commissioner and his delegate, Special Agent Clarke, had authority under the facts disclosed in this case to issue the summons.

II. Section 3615 authorizes the Collector to issue summonses and specifically authorizes an attachment when a person summoned neglects or refuses to obey the summons issued under "this section." Since the Commissioner's summons is provided for in a different section, towit, section 3614, there appears to be merit to the appellant's argument that the specific authorization for attachment in 3615 applies only to summonses issued under such section. However, section 3633 provides that the District Court shall have jurisdiction to compel attendance and production of papers by "appropriate process." This section clearly authorizes the enforcement of Commissioner's summonses issued pursuant to section 3614. Section 3800 also authorizes the District Court to grant in proper cases such order and process as may be necessary or appropriate for the enforcement of the revenue laws.

Is attachment an appropriate process to enforce the Commissioner's summons? We think that it is. As above stated, attachment is specifically authorized for enforcing a collector's summons. If attachment is an appropriate method for enforcing a collector's summons, we can see no logical reason why it would not be an appropriate process for enforcing the Commissioner's summons. The 1954 Revenue Code became effective on August 16, 1954. This case was submitted on June 16, 1954, but was not decided until March 31, 1955. Under such circumstances we shall assume that the provisions of the 1954 Code do not apply. However, we believe that it is of some significance that under sections 7602 and 7604 of the 1954 Revenue Code attachment is expressly recognized as an appropriate process for enforcing the Commissioner's summons.[4] Moreover, as we have heretofore pointed out, this court has specifically

---

[4] Section 7604 (b) of the Revenue Code of 1954 provides:

"Whenever any person summoned under section 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary or his delegate may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience."

The legislative history of this section shows that Congress did not believe that it was giving the Secretary or his delegate any new powers by authorizing attachment. The House Ways and Means Committee Report, 1954 U. S. Code Congressional Service, p. 4584, and Senate Finance Committee Report, 1954 U. S. Code Congressional Service, p. 5268, contain the statement in effect that no change is made in existing law, relative to enforcement.

recognized the propriety of enforcing the Commissioner's summons by attachment in the **Brownson** case, supra.

The District Court by issuing the attachment in this case determined that a proper showing for an attachment had been made. The attachment issued, and thereunder the appellant was produced before the court. The court upon appellant's motion to dismiss and quash upheld the regularity of the attachment.

The only authority cited for the appellant to sustain his contention that attachment is not a proper remedy is **In re Wolrich**, supra. That case, so far as here pertinent, merely holds that a subpoena duces tecum or an order to appear and produce is an appropriate process. The question of whether an attachment is an appropriate process was not before the court, and such issue was not discussed or decided.

We hold that the District Court acquired jurisdiction over the appellant by means of the service of the attachment and the production of the appellant thereunder. The court having acquired jurisdiction over the appellant was fully authorized to enforce the summons and direct the appellant to appear and produce the papers.

III. The District Court held that the work papers the Special Agent was seeking "are and were at all times the property of the accountant, Max Rosenbaum." The evidence on the ownership of the work papers is conflicting. There is evidentiary support for the court's finding. The work papers had remained in the accountant's possession from 1949 to 1953 and had been kept in the accountant's office with similar work papers arising out of other transactions. We are unable to say that the court's decision on this issue was clearly erroneous. Since the court found that the work papers were the property of the accountant and not the property of the taxpayers, the issue of attorney-

client privilege does not arise. No privilege exists between an accountant and his client which would preclude the production of the accountant's work papers. **Falsone v. United States**, supra. The court committed no error in ordering the appellant to produce the accountant's work papers.

We have considered the errors urged by the appellant and are convinced that the trial court has committed no prejudicial error.

The judgment is affirmed.

Johnsen, Circuit Judge, concurring specially.

Except for the previous holding of this Court, in **Brownson v. United States**, 8 Cir., 32 F. 2d 844, I should not be willing to regard sections 3614 (a) and 3633 of the Internal Revenue Code of 1939, 26 U. S. C. A., as authorizing applications for personal arrests to be made, in enforcement of a Revenue Agent's investigative summons or subpoena.

Contempt or contumacy in the nature of contempt, as the basis for such an application, does not, and cannot, in my opinion, legally exist in the administrative or executive branch of government—as it inherently does in the judicial field—except by virtue of an express legislative act directly creative of it.

Congress has, as to a few specific administrative summons and subpoenas, seen fit to create the right to an attachment against the person "as for a contempt". See e. g. § 3615 (e), Int. Rev. Code 1939, and § 7604, Int. Rev. Code 1954. But in each instance, it has made the grant in unmistakable language, has restricted its application to the summons authorized by a named statutory section, and has prescribed the safeguards of a preliminary hearing on the application and an immediate hearing after the seizure, in

relation to any exercise of the right. Sections 3614 (a) and 3633 are without either language of such a grant or prescription of such safeguards.

I should not have supposed that a court would lend its sanction to any laying of hands upon an individual's person and the dragging of him bodily before a magisterial bench, for an administrative purpose and as an administrative incident, without being able to read, both for itself and to him, language from a statute, which expressly spelled out the administrative right thus to have his liberty imposed upon and to have these indignities inflicted upon him.

The **Brownson** case, however, has done just this, and the majority here have both accepted that decision and approved its basis.

In this situation, I must officially bow to the established law of the Court, so far as the immediate statute involved is concerned.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

(Judgment.)

UNITED STATES COURT OF APPEALS
for the Eighth Circuit.

No. 15374.

September Term, 1955.

Friday, January 13, 1956.

Wilbur A. Sale,

Appellant,

vs.

United States of America.

Appeal From the United States District Court for the Eastern District of Missouri.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed.

January 13th, 1956.

Statutes Involved.

3614. **Examination of Books and Witnesses.**

(a) To determine liability of the taxpayer. The Commissioner, for the purpose of ascertaining the correctness of any return or for the purpose of making a return where none has been made, is authorized, by any officer or employee of the Bureau of Internal Revenue, including the

field service, designated by him for that purpose, to examine any books, papers, records, or memoranda bearing upon the matters required to be included in the return, and may require the attendance of the person rendering the return or of any officer or employee of such person, or the attendance of any other person having knowledge in the premises, and may take his testimony with reference to the matter required by law to be included in such return with power to administer oaths to such person or persons.

3615 (a). **Summons From Collector to Produce Books and Give Testimony.**

(a) General authority. It shall be lawful for the collector, subject to the provisions of this section, to summon any person to appear before him and produce books at a time and place named in the summons, and to give testimony or answer interrogatories, under oath, respecting any objects or income liable to tax or the returns thereof. The collector may summon any person residing or found within the State or Territory in which his district lies; and when the person intended to be summoned does not reside and can not be found within such State or Territory, he may enter any collection district where such person may be found and there make the examination herein authorized. And to this end he may there exercise all the authority which he might lawfully exercise in the district for which he was commissioned.

(c) Enforcement. Whenever any person summoned under this section neglects or refuses to obey such summons, or to give testimony, or to answer interrogatories as required, the collector may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application,

and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have power to make such order as he shall deem proper not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

3633. **Jurisdiction of District Courts.**

(a) To enforce summons. If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.

(b) To issue orders, processes, and judgments. For authority of district courts to issue orders, processes, and judgments for enforcement of internal revenue laws, see sections 3799-3800.

BRIEF FOR THE UNITED STATES

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Statutes involved	2
Statement	5
Argument	8
Conclusion	13

CITATIONS

Cases:

Bolich v. *Rubel*, 67 F. 2d 894	9
Brownson v. *United States*, 32 F. 2d 844	9, 10
Chapman v. *Goodman*, 219 F. 2d 802	10, 12
Cudahy Packing Co. v. *Holland*, 315 U.S. 357	11
Falcone v. *Barnes*, 350 U.S. 179	11
Falsone v. *United States*, 205 F. 2d 734, certiorari denied, 346 U.S. 864	9
First National Bank of Mobile v. *United States*, 267 U.S. 576, affirming, *per curiam*, 295 Fed. 142	9
Lee, Albert Lindley, Memorial Hospital, In re, 209 F. 2d 122, certiorari denied, *sub nom. Cincotta* v. *United States*, 347 U.S. 960	9
Martin v. *Chandis Securities Co.*, 128 F. 2d 731	12
McCrone v. *United States*, 307 U.S. 61	9, 10
Peoples Deposit Bank & Trust Co. v. *United States*, 212 F. 2d 86, certiorari denied, 348 U.S. 838	9
United States v. *Minker*, 350 U.S. 179	11
United States v. *United Distillers Products Corp.*, 156 F. 2d 872	9
Wolrich, In re, 84 F. Supp. 481	12

Statutes:

Internal Revenue Code of 1939:	
Sec. 3614 (26 U.S.C. 1952 ed., Sec. 3614)	2, 8, 9
Sec. 3615 (26 U.S.C. 1952 ed., Sec. 3615)	3, 8, 9, 10
Sec. 3633 (26 U.S.C. 1952 ed., Sec. 3633)	4, 10
Sec. 3800 (26 U.S.C. 1952 ed., Sec. 3800)	4, 10

Statutes—Continued

Page

Internal Revenue Code of 1954:

Sec. 7602 (26 U.S.C. 1952 ed., Supp. II, Sec. 7602) 9, 12

Sec. 7604 (26 U.S.C. 1952 ed., Supp. II, Sec. 7604) 11, 13

Miscellaneous:

H. Rep. No. 1337, 83d Cong., 2d Sess., p. 436..... 9, 11

S. Rep. No. 1622, 83d Cong., 2d Sess., p. 617..... 9, 11

In the Supreme Court of the United States

OCTOBER TERM 1955

No. 696

WILBUR A. SALE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 11-19) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on January 13, 1956. (Pet. 21.) The petition was filed on February 16, 1956. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether an agent of the Internal Revenue Service was authorized by Section 3614(a) of the

Internal Revenue Code of 1939 to issue a summons to appear, to testify and to produce records.

2. Whether the issuance of an attachment by the District Court was an appropriate process under Sections 3633(a) and 3800 of the Internal Revenue Code of 1939 to compel obedience to the agent's summons.

STATUTES INVOLVED

Internal Revenue Code of 1939:

> SEC. 3614. EXAMINATION OF BOOKS AND WITNESSES.
>
> (a) *To Determine Liability of the Taxpayer.*—The Commissioner, for the purpose of ascertaining the correctness of any return or for the purpose of making a return where none has been made, is authorized, by any officer or employee of the Bureau of Internal Revenue, including the field service, designated by him for that purpose, to examine any books, papers, records, or memoranda bearing upon the matters required to be included in the return, and may require the attendance of the person rendering the return or of any officer or employee of such person, or the attendance of any other person having knowledge in the premises, and may take his testimony with reference to the matter required by law to be included in such return, with power to administer oaths to such person or persons.
>
> * * * * *
>
> (26 U.S.C. 1952 ed., Sec. 3614.)

SEC. 3615. SUMMONS FROM COLLECTOR TO PRODUCE BOOKS AND GIVE TESTIMONY.

(a) *General Authority.*—It shall be lawful for the collector, subject to the provisions of this section to summon any person to appear before him and produce books at a time and place named in the summons, and to give testimony or answer interrogatories, under oath, respecting any objects or income liable to tax or the returns thereof. The collector may summon any person residing or found within the State or Territory in which his district lies; * * *

* * * * *

(e) *Enforcement.*—Whenever any person summoned under this section neglects or refuses to obey such summons, or to give testimony, or to answer interrogatories as required, the collector may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States

commissioner shall have power to make such order as he shall deem proper not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

(26 U.S.C. 1952 ed., Sec. 3615.)

SEC. 3633. JURISDICTION OF DISTRICT COURTS.

(a) *To Enforce Summons.*—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.

* * * * *

(26 U.S.C. 1952 ed., Sec. 3633.)

SEC. 3800. JURISDICTION OF DISTRICT COURTS TO ISSUE ORDERS, PROCESSES, AND JUDGMENTS.

The district courts of the United States at the instance of the United States shall have such jurisdiction to make and issue, both in actions at law and suits in equity, writs and orders of injunction, and of ne exeat republica, orders appointing receivers, and such other orders and process, and to render such judgments and decrees, granting in proper

cases both legal and equitable relief together, as may be necessary or appropriate for the enforcement of the internal revenue laws. The remedies hereby provided are in addition to and not exclusive of any and all other remedies of the United States in such courts or otherwise to enforce such laws.
(26 U.S.C. 1952 ed., Sec. 3800.)

STATEMENT

On May 19, 1954, upon petition of the United States Attorney, the District Court for the Eastern District of Missouri entered an order that attachment issue for petitioner to compel his obedience to a summons, served upon him by a special agent of the Internal Revenue Service, to appear and to produce records. (R. 7-8.) Petitioner, having been brought before the court and released on his own recognizance, filed motions to dissolve and discharge the attachment and to quash the summons. (R. 9-13.) After a hearing, the court entered an order on March 31, 1955, overruling petitioner's motions but dissolving the writ of attachment on its own motion, and directing petitioner to comply with the summons. (R. 20-21.) The judgment was affirmed by the Court of Appeals. (Pet. 11-19.)

The pertinent facts are as follows:

Petitioner is an attorney and at all times material hereto represented John Gazzoli and Albert Librach, partners, in tax controversies with the Internal Revenue Service. (R. 9-11.) John F.

Clarke, a special agent of the Internal Revenue Service, was directed to investigate the income tax liability of Gazzoli and Librach for the years 1946 through 1949. In the course of the investigation, Clarke sought to examine work papers relating to the partnership which had been prepared by Max Rosenbaum, an accountant, and which were in the possession of petitioner. (R. 3-5, 15-16.) Rosenbaum had performed accounting services, including the preparation of tax returns, on a fee basis for the partnership during the years 1946 through 1949. In the course of performing such services, Rosenbaum had prepared work papers which he had retained in his office files until the early part of 1953, at which time he turned the work papers over to petitioner at the request of either Gazzoli or Librach. Rosenbaum's work papers have been in petitioner's possession since some time prior to May 4, 1953. (R. 16-17.)

On May 4, 1953, Special Agent Clarke executed and served upon petitioner a summons to appear, to testify and to produce the work papers and schedules, relating to the partnership for the years 1946 through 1949, which had been prepared by Rosenbaum. The summons was issued pursuant to the authority conferred upon the Commissioner by Section 3614 of the Internal Revenue Code of 1939.[1] (R. 5-6.) Immediately upon receipt of the summons, petitioner personally delivered to Clarke a letter in which he advised the latter that the work papers requested were the property of

[1] Statutory references are to the Internal Revenue Code of 1939, unless otherwise indicated.

his clients and were privileged communications in his hands as attorney; that, in the absence of fraud, examination of his clients' tax liability for the years in question was barred by the statute of limitations, and that nothing in the summons indicated that a determination of fraud was contemplated; and that he would not comply with the summons unless directed to do so by the District Court. (R. 11, 18-19.)

On May 19, 1954, at the request of the Commissioner, the United States Attorney filed a petition for attachment in the District Court to compel obedience to the summons alleging, *inter alia*, petitioner's possession of the records described in the summons, the issuance of the summons and petitioner's refusal to comply. (R. 1-3.) An affidavit of Special Agent Clarke (R. 3-5) and a copy of the summons (R. 5-6) were attached to the petition. The petition was filed pursuant to the provisions of Section 3633 of the Code. On the same day, the court entered an *ex parte* order that attachment issue for petitioner and that he be brought into court for appropriate action to compel obedience to the summons. (R. 7-8.) Pursuant thereto, petitioner was taken into custody by the marshal, brought before the court and released on his own recognizance subject to further action of the court. (R. 9-10.)

On May 28, 1954, petitioner filed motions to dissolve and discharge the attachment and to quash the summons alleging, *inter alia*, that the court was without jurisdiction to entertain the petition for attachment and that the work papers called

for in the summons were the property of his clients and were privileged communications in his hands. (R. 9-13.) A hearing on the motions was held on June 16, 1954. (Pet. 4.) Petitioner did not introduce any evidence at the hearing; the Government offered the testimony of Special Agent Clarke and Rosenbaum. (R. 14-17.) At the conclusion of the hearing, the court reserved ruling on the motions.

On March 31, 1955, the court entered an order in which it overruled petitioner's motions, dissolved the writ of attachment on its own motion, and directed petitioner to comply with the summons. The court also found that the work papers described in the summons were the property of Rosenbaum and not the property of petitioner's clients, and it concluded that the petition for attachment was a prayer for appropriate process to compel appearance and the production of records under Section 3633 of the Code. (R. 20-21.) Execution of the order was stayed pending appeal. (R. 25.) The Court of Appeals affirmed, one judge concurring specially. (Pet. 11-20.)

ARGUMENT

1. Petitioner's contention (Pet. 6-9) that the special agent had no authority under Section 3614 of the Code, *supra*, p. 2, to issue the summons in question because that section does not expressly provide for the issuance of a summons by the Commissioner or his delegate, is without merit.[2]

[2] Section 3615 of the Code, *supra*, pp. 3-4, specifically provided for the issuance of a summons by the Collector to compel attendance, testimony and the production of records. Under

Section 3614(a) of the Code authorized the Commissioner or his delegate, for the purpose of ascertaining the correctness of any return, to examine any books and records bearing upon matters required to be included in the return and to require the attendance and testimony of any person having knowledge in the premises. This Court and the lower federal courts have repeatedly recognized the authority of the Commissioner or his delegate to issue an administrative summons under the sweeping language of the above section of the Code and similar provisions of prior Revenue Acts. *First National Bank of Mobile* v. *United States,* 267 U. S. 576, affirming, *per curiam,* 295 Fed. 142 (S. D. Ala.); *McCrone* v. *United States,* 307 U. S. 61; *Brownson* v. *United States,* 32 F. 2d 844 (C.A. 8th); *Bolich* v. *Rubel,* 67 F. 2d 894 (C.A. 2d); *United States* v. *United Distillers Products Corp.,* 156 F. 2d 872 (C.A. 2d); *Falsone* v. *United States,* 205 F. 2d 734 (C.A. 5th), certiorari denied, 346 U. S. 864; *In re Albert Lindley Lee Memorial Hospital,* 209 F. 2d 122 (C.A. 2d), certiorari denied *sub nom. Cincotta* v. *United States,* 347 U. S. 960; *Peoples Deposit Bank & Trust Co.* v. *United*

---

the Internal Revenue Code of 1939, internal revenue agents' and special agents' summons were issued under Section 3614 whereas Collectors' summons were issued under Section 3615. The two sections were combined in Section 7602 of the Internal Revenue Code of 1954, which specifically authorizes the Secretary or his delegate to issue summons. The Report of the House Ways and Means Committee on the Internal Revenue Code of 1954 (H. Rep. No. 1337, 83d Cong., 2d Sess., p. 436) and the Report of the Senate Finance Committee (S. Rep. No. 1622, 83d Cong., 2d Sess., p. 617) each state that Section 7602 "contains no material change from existing law."

States, 212 F. 2d 86 (C.A. 6th), certiorari denied, 348 U. S. 838; *Chapman* v. *Goodman,* 219 F. 2d 802 (C.A. 9th).

2. Petitioner's contention that the issuance of an attachment by the District Court to compel obedience to the summons was not an appropriate process under Section 3633 of the Code, *supra,* p. 4, is likewise without substance. Section 3633(a) of the Code conferred jurisdiction upon the District Courts to enforce summons issued under the internal revenue laws by "appropriate process". Section 3800 of the Code, *supra,* pp. 4-5, also conferred jurisdiction upon the District Courts to issue "such other orders and process * * * as may be necessary or appropriate for the enforcement of the internal revenue laws." Congress in enacting Section 3615 of the Code, *supra,* pp. 3-4, expressly authorized attachment for enforcing a collector's summons. As was observed by the court below (Pet. 17), "If attachment is an appropriate method for enforcing a collector's summons, we can see no logical reason why it would not be an appropriate process for enforcing the Commissioner's summons."[3]

---

[3] In rejecting petitioner's contention, the court below followed its earlier decision in *Brownson* v. *United States, supra,* which was cited by this Court in *McCrone* v. *United States, supra.*

Petitioner in effect concedes (Pet. 9), as he must, that he would have no ground for complaint had the summons been issued by an agent of the Collector, rather than by an agent of the Commissioner. See Section 3615 (a) and (e), *supra,* pp. 3-4.

Furthermore, as the court below pointed out (Pet. 17), under Section 7604 of the Internal Revenue Code of 1954, entitled "Enforcement of summons," attachment is expressly authorized as an appropriate process for enforcing summons issued under the internal revenue laws, and Congress in so providing clearly indicated that it was not changing existing law. H. Rep. No. 1337, 83d Cong., 2d Sess., p. 436; S. Rep. No. 1622, 83d Cong., 2d Sess. p. 617.

3. The decision of the court below is not, as petitioner asserts (Pet. 6-7), in conflict with the decisions of this Court in *Cudahy Packing Co.* v. *Holland,* 315 U. S. 357, and *United States* v. *Minker,* 350 U. S. 179, and *Falcone* v. *Barnes,* 350 U. S. 179. The cited cases did not arise under the internal revenue laws, nor did they involve statutory provisions similar to these here involved. The issue in the *Cudahy Packing Co.* case was (p. 358) "whether under the Fair Labor Standards Act * * * the Administrator of the Wage and Hour Division of the Department of Labor has authority to delegate his statutory power to sign and issue a subpoena duces tecum." In the *Minker* and *Falcone* cases the issue was whether under the Immigration and Nationality Act of 1952 an immigration officer is empowered to subpoena a naturalized citizen who is the subject of an investigation to determine if good cause exists for the institution of denaturalization proceedings against him. This turned on the meaning of the word "witness" as used by Congress in the pertinent section of that Act.

Nor is the decision below in conflict with the decision of the Court of Appeals in *Martin* v. *Chandis Securities Co.*, 128 F. 2d 731 (C.A. 9th), or the decision of the District Court in *In re Wolrich*, 84 F. Supp. 481 (S.D. N.Y.). In *Martin* v. *Chandis Securities Co., supra,* the court stated that it was expressing no opinion on the question whether the summons involved (which was issued by a revenue agent under Section 3614 of the Code) was invalid because not issued by a Collector. Cf. *Chapman* v. *Goodman, supra. In re Wolrich, supra,* held that an order to appear and produce is an appropriate process to enforce a special agent's summons issued under Section 3614 of the Code and actually supports the Government's position in this case. The question whether attachment is an appropriate process was not before the court.

4. We point out, additionally, that the questions here presented, which turn entirely upon application of the provisions of the Internal Revenue Code of 1939, have no present importance under Sections 7602-7606 of the Internal Revenue Code of 1954. Section 7602 of the 1954 Code explicitly authorizes the Secretary or his delegate to issue a summons. And Section 7604(b) of the 1954 Code is equally explicit in authorizing the District Court to enforce the summons by attachment. Moreover, the explanatory Committee Reports make it clear that these provisions effected no material change from the then existing law. See footnotes 3 and 4 of the opinion below (Pet. 14-15, 17), and footnote 2, *supra,* pp. 8-9.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

SIMON E. SOBELOFF,
Solicitor General.
CHARLES K. RICE,
Acting Assistant Attorney General.
HARRY BAUM,
JOHN J. MCGARVEY,
Attorneys.

MARCH, 1956.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1956 977844 1081